

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
DELTA DIVISION

HORN LAKE WATER ASSOCIATION, INC.,

Plaintiff,

v.

NO. 2:93CV154-S-O

CITY OF HORN LAKE, MISSISSIPPI, et al.,

Defendants.

OPINION

In this case, plaintiff, a nonprofit, private utility company, seeks declaratory and injunctive relief regarding defendants' authority to condemn or otherwise infringe upon its service area. Presently before the court is plaintiff's motion for summary judgment.

FACTS

The plaintiff is a nonprofit corporate utility company which was created and exists under the laws of the State of Mississippi. It is engaged in the business of operating a water system in an area of DeSoto County, Mississippi, pursuant to a permanent certificate and supplemental certificates of convenience and necessity issued by the Mississippi Public Service Commission. The defendants are the City of Horn Lake; its mayor, Mike Thomas; and two members of the Board of Alderman, Barbara McCall and Lisa Fuller.

The alleged controversy in this case centers on certain actions taken by the individual defendants at an October 6, 1993, city board meeting. At that time, these defendants voted in favor of a resolution authorizing "the Law Firm of Tollison, Austin and Twiford, nine (9) hours at \$125.00 per hour to do some research and draft a legal opinion for the City of Horn Lake for the purpose of providing information to make a decision concerning the acquisition of the Water Association." Approximately three years previously, Mayor Thomas stated in a deposition (presumably taken in connection with a city annexation proceeding) that it was the intent of the City of Horn Lake to take over plaintiff's operations "by whatever legal means we can."

Less than a week after the board's actions, plaintiff filed the instant declaratory judgment action, seeking a declaration that defendants' actions violate, inter alia, 7 U.S.C. § 1926(b). That statute provides:

The service provided or made available through any [rural water system indebted to the Department of Agriculture] shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

Plaintiff is presently indebted to the Farmers Home Administration in the sum of approximately \$440,905.08.

#### DISCUSSION

Plaintiff has now moved for summary dismissal of this cause, relying on the cases of City of Madison v. Bear Creek Water Association, Inc., 816 F.2d 1057 (5th Cir. 1987) and Moore Bayou Water Association, Inc. v. Town of Jonestown, 628 F. Supp. 1367 (N.D. Miss. 1986). These cases clearly and undeniably hold that a city may not condemn a water association's facilities located within its city limits during the term of the association's indebtedness to the Farmers Home Administration. In response, defendants acknowledge this result, see Proposed Findings of Fact and Conclusions of Law Tendered by the Defense, but argue that because the city has taken no affirmative steps (other than to seek a legal opinion regarding its options) to encroach or infringe on plaintiff's service area, there is no justiciable controversy for the court's consideration, and the case should therefore be dismissed. The court agrees.

A fundamental prerequisite for the issuance of a declaratory judgment is that there must be an "actual controversy" between the parties. 28 U.S.C. § 2201(a); see also U.S. Const. art. III, § 2 (federal court may act only in cases and controversies). In addressing this requirement, the United States Supreme Court has stated: "[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Company v. Pacific Coal

& Oil Company, 312 U.S. 270, 273 (1941). With this in mind, the Fifth Circuit has fashioned the following rule for determining whether a request for declaratory relief presents an actual controversy: "A controversy, to be justiciable, must be such that it can presently be litigated and decided and not hypothetical, conjectural, conditional or based upon the possibility of a factual situation that may never develop." Brown & Root, Inc. v. Big Rock Corp., 383 F.2d 662, 665 (5th Cir. 1967); see also Rowan Companies, Inc. v. Griffin, 876 F.2d 26, 27-28 (5th Cir. 1989); 10A Charles A. Wright et al., Federal Practice & Procedure § 2757 (2d ed. 1983).

In this case, the court is of the opinion that no actual controversy exists between the instant parties sufficient to entertain this cause. Unlike the municipalities in Bear Creek and Moore Bayou, which had begun condemnation proceedings against the water systems, these defendants have done nothing more than express their interest in acquiring the plaintiff water system and seek counsel to explore the possibility of pursuing that interest. These actions do not rise to the level of creating an actual controversy but rather evidence the "possibility of a factual situation that may never develop," Brown & Root, 383 F.2d at 665, especially in light of defendants' admission regarding the lawfulness of a condemnation action against plaintiff. For these reasons, this cause is therefore dismissed.

An appropriate final judgment shall issue.

This \_\_\_\_\_ day of September, 1994.

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CHIEF JUDGE